Victoria Partners, a Partnership of Mirage Resorts, Inc. *and* Circus Circus Enterprises, Inc. d/b/a Monte Carlo Resort & Casino and International Union of Operating Engineer, Local 501, AFL–CIO. Case 28–CA–13975

October 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 19, 1997, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order, as modified.[2]

In adopting the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing final disciplinary notices to employees Council and Brickey, we find it unnecessary to rely on the judge's "fruit of the poisonous tree" analysis. It is undisputed that the Respondent's stated reason for issuing disciplinary notices was Council's and Brickey's violation of the Respondent's employee handbook rules prohibiting "unauthorized posting, distribution, sale or circulation of written material in working areas [or] unauthorized sale of anything while on the premises" (rule 21) and "soliciting, procuring or engaging in any immoral acts on the premises" (rule 24). However, neither Brickey nor Council posted distributed, sold, or circulated any material, nor did they engage in solicitation even arguably within the meaning of rule 24. Moreover, as to employee Brickey, there is no evidence in the record that his conduct involved any solicitation at all. Rather, the employee statements in the record on which the Respondent claimed it relied in disciplining Brickey indicate that he merely listened as another employee solicited him. Under these circumstances, we conclude that the issuance of final disciplinary notices to Council and Brickey for violation of these rules was baseless and clearly pretextual. See *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Thus, we agree with the judge that the discipline of these employees violates Section 8(a)(3) and (1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Victoria Partners, a Partnership of Mirage Resorts, Inc., and Circus Circus Enterprises d/b/a Monte Carlo Resort and Casino, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c):

"(c) Discriminatorily issuing written warnings to employees for violation of employee handbook rules."

2. Add the following as paragraph 1(d) and renumber accordingly:

"(d) Creating an impression among employees that their union activities were under surveillance."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's findings that Paul Leysen and Vincent Pangallo are not statutory supervisors, we do not rely on the judge's comments, in Secs. III(B)(3)(a) and III(C)(2), respectively, concerning the prevalence of resume inflation and employee independence from close supervision as a treasured feature of the graveyard shift. In adopting the judge's finding in Sec. III(C)(2) of his decision that Leysen and Pangallo did not have the authority to effectively transfer employees, we also do not rely on his finding that the transfers referenced by the Respondent did not involve employee discipline. Further, we do not rely on the judge's finding in Sec. III(B)(3)(a) that, because Leysen's position description was never shown to him, it is of little value in establishing supervisory status. Concerning Leysen's comment to employee Suvoski to the effect that Suvoski should disregard instructions from the deputy chief and chief engineers, discussed in Sec. III(C)(2) of the judge's decision, we rely solely on the judge's finding that this comment is not evidence of supervisory status. Last, we adopt the judge's findings that Leysen and Pangallo are not supervisors even accepting the Respondent's representations in its exceptions concerning the percentages of time they spend "working with the tools."

In adopting the judge's findings that Leysen and Pangallo are not supervisors within the meaning of the Act, Member Brame does not rely on the judge's statement that supervisory status must not be construed too broadly because the employee who is deemed a supervisor is denied the Act's protection, or upon the citation to *Chevron Shipping Co.*, 317 NLRB 379, 380–381 (1995)

[2] We have modified the Order and issued a new notice to more closely reflect the violations found.

WE WILL NOT discharge employees because they engaged in protected concerted activity or union activity.

WE WILL NOT unlawfully interrogate our employees.

WE WILL NOT create an impression among our employees that their union activities are under surveillance.

WE WILL NOT discriminatorily issue disciplinary notices to employees for violation of employee handbook rules.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any of our employees in the exercise of any of the above rights which are protected under the National Labor Relations Act.

WE WILL, within 14 days from the date of the Board's Order, offer Paul Leysen and Vincent Pangallo full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Leysen and Pangallo whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharges of Leysen and Pangallo, and any written disciplinary notices issued to Gary Brickey and to Jerry Council, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

VICTORIA PARTNERS, A PARTNERSHIP OF MIRAGE RESORTS, INC. AND CIRCUS CIRCUS ENTERPRISES, INC. D/B/A MONTE CARLO RESORT & CASINO

Nathan W. Albright and *David Lujan, Esqs.,* of for the General Counsel.

Harriet Lipkin and *Celeste M. Wasielewski, Esqs. (Pantaleo, Lipkin & Moss, P.C.),* of Washington, D.C., for the Respondent.

Lewis N. Levy, Esq. (Levy, Goldman & Levy), of Los Angeles, California, for the Charging Party.

DECISION[1]

STATEMENT OF THE CASE[2]

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Las Vegas, Nevada, on March 10, 11 and 12, 1997,[3] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 28 on December 20, and which is based on charges filed by International Union of Operating Engineers, Local 501, AFL–CIO (the Union) on October 29 (original), and December 16 (amended). The complaint alleges that Victoria Partners, a Partnership of Mirage Resorts, Inc. and Circus Circus Enterprises, Inc. d/b/a Monte Carlo Resort & Casino (Respondent) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).

Issues

I. Whether for all times material to this case, Respondent proved that alleged discriminatees, Paul Leysen and Frank Pangallo, were statutory supervisors pursuant to Section 2(11) of the Act.

II. Whether Respondent, acting through Jacqueline DeRoode, unlawfully interrogated employees about their own and other employees' union membership, activities, and sympathies and unlawfully created the impression among its employees that their union activities were under surveillance by Respondent.

III. Whether Respondent unlawfully issued final warning disciplinary notices to two of its employees for alleged violations of two employee handbook rules purporting to regulate distribution and solicitation.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent.

On the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that it is a partnership of Gold Strike L.V., a Nevada general partnership and MRGS Corp., d/b/a Monte Carlo Resort and that Respondent is wholly owned by or are subsidaries of Circus Circus Enterprises, Inc., and Mirage Resorts, Inc., which operates a hotel and casino and maintains an office and place of business located in Las Vegas, Nevada. Respondent further admits that based on a projection of its operations since on or about June 21, at which time Respondent commenced operations, Respondent in the course and conduct of its business operations described above, will annually derive gross revenues therefrom in excess of $500,000. Respondent further admits that based on a projection of its operations since on or about June 21, Respondent in the course and conduct of its business operations described above, will annually purchase and receive in interstate commerce at Respondent's facility, products, goods and materials valued in excess of $50,000 directly from points outside the State of Nevada. Accordingly, Respondent admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that International Union of Operating Engineers, Local 501, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

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[1] In a motion to postpone hearing (G.C. Exh. 1(q)), filed on or about January 6, 1997, Respondent averred that Respondent's proper name was Victoria Partners, a partnership of Gold Strike L.V., a Nevada general partnership, a M.R.G.S. Corp., d/b/a Monte Carlo Resort & Casino. Because no motion to correct the case name was ever made and because even Respondent's posthearing brief contains the original case name, I will make no changes.

[2] Without objection, Respondent's motion to correct transcript, dated May 9, 1997, is granted.

[3] All dates herein refer to 1996 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Overview

1. The General Counsel's amendments to complaint

On the first day of hearing, the General Counsel moved to amend the complaint in certain respects. The "housekeeping" matters were allowed, without objection. However, the General Counsel moved to add one substantive allegation, represented by issue III, above (G.C. Exh. 3). For various reasons, Respondent did object to this amendment, including lack of time to investigate the new allegation. To prove a prima facie case on both the original and amended allegation, the General Counsel offered only documents. In the latter instance, the General Counsel represented that the documents on which he relies were documents furnished by Respondent shortly before hearing began, pursuant to the General Counsel's subpoena duces tecum. In any event, to resolve the problem of Respondent's lack of time to prepare for the new allegation, I held the record open for 30 days after both sides rested on the original complaint allegations. On March 18, 1997, Respondent submitted an amended answer. Thereafter, I was notified by Respondent on or about April 4, 1997, by conference telephone call, that Respondent would not offer additional evidence with respect to the new allegation. By Order of April 14, 1997, I closed the record and set a briefing schedule.

I now mark the amended answer, and the Order of April 14, 1997, as General Counsel Exhibits 1(l) and 1(m), respectively, and admit them into evidence.

2. Stipulation

All or most of this case is dependent on whether the two alleged discriminatees were, for all times material to the case, statutory supervisors. In a rare but no less welcome time-saving procedure, the parties have agreed on a written pre-hearing stipulation which reads as follows:

> Re: Monte Carlo Resort & Casino
> Case 28–CA–13975
>
> STIPULATION
>
> The parties stipulate as follows:
>
> (1) At all relevant times, only Lee Fofi and Gary Hughes has authority to authorize and enter into Respondent's timeclocks, to authorize overtime or schedule changes allowing for payment of wages to any employee employed in Respondent's Engineering department.
>
> (2) Respondent Respondent stipulates that Paul Leysen and Frank Pangallo were discharged because of the conduct as set forth in paragraphs 5(e) and 5(h) (renumbered as 5(I) if amendment to the complaint is allowed) of the outstanding complaint. The parties stipulate that if Paul Leysen and Frank Pangello are found to be supervisors within the meaning of Section 2(11) of the Act, Respondent did not violate 8(a)(1) and (3) of the Act as set forth in the outstanding complaint. The parties further stipulate that if Paul Leysen and Frank Pangallo are not found to be supervisors within the meaning of Section 2(11) of the Act, Respondent independently violated Section 8(a)(1) of the Act as set forth in paragraph 6 and 8 of the oustanding complaint and violated Section 8(a)(1) and (3) of the Act, as set forth in the outstanding complaint, by the discharges of Paul Leysen and Frank Pangello.
>
> Dated: 3/10/97 By: /s/ Nathan W. Albright
> Nathan W. Albright, counsel for
> the General Counsel.
> Dated: 3/10/97 By: /s/ Harriet Lipkin
> Harriet Lipkin, counsel for the
> Respondent.
> Dated: 3/10/97 By: /s/ Lewis Levy
> Lewis Levy, counsel for the
> Charging Party.
> [G.C. Exh. 2.][4]

B. Facts

1. Respondent's property

On or about June 21, Respondent opened for business. Located on a prime 54-acre site, the hotel/casino contains some of the best of what Las Vegas has to offer: a 120,000 square foot casino with 95 table games, 2800 slot machines, separate areas for poker, keno, bingo, and a sports book. If the players ever tire, they may retire to one of over 3000 hotel rooms to rest. If they are hungry, Respondent offers a choice among four public restaurants and one for its employees. If they thirst, there are two main bars and one service bar at the ready. Each hotel room contains at least one private bath and the property maintains numerous public bathrooms for the convenience of its guests. Several swimming pools are located around the property.

Insuring the comfort of Respondent's guests is a job performed by the equipment in the central plant, and the engineers who work there or in related behind the scene jobs. To keep guests warm in winter and cool in the summer, the central plant contains four 300-hp. boilers and 21 pumps moving water around the property; five 1000-ton chillers and five 1500-ton cooling towers on the roof.[5] Numerous elevators serve the public going to and coming from their rooms in the tower areas. The area of the central plant is about 4000 square feet.

Notwithstanding the fact that all the equipment is new, power outages occur, water lines break, elevators go out of service, cooling towers need to be lengthened, locks malfunction, its too hot or too cool. These are only a sampling of what can and has gone wrong at Respondent's new hotel/casino. Keeping the property in full operation when things go wrong is the responsibility of its engineering staff upon which this case focuses. I should also add that the staff maintains a complex fire prevention and firefighting program which thus far has worked well in preventing fires. Finally the staff performs a number of regular maintenance chores in and around the property, so that all or most equipment works as expected.

2. Respondent's engineering staff

Respondent's chief engineer is August (Lee) Fofi, who was a witness both for Respondent and for the General Counsel. Hired as of June 4, 1995, Fofi worked at Respondent's project as it was being constructed. His expertise was useful from both a technical and personnel point of view. That is, Fofi had years

[4] Par. 6 of the complaint referred to in the stipulation alleges violations of the Act represented by issue II, above.

[5] Respondent presented a video tape (R. Exh. 24) showing many nonpublic areas of Respondent in the central plant, such as an office, many of the major pieces of equipment and other relevant details.

of experience working at various properties in and around Las Vegas. His last job before Respondent was at the MGM Grand Hotel/Casino where he was an engineer on the graveyard shift and for 2 days of the week, he worked as a replacement shift supervisor. Fofi's technical and professional experience garnered over the years was useful in planning and building Respondent to be as efficient as possible. But Fofi had another job as well: to recruit a staff of subordinate engineers, experienced and capable like Fofi himself. Fofi hired his deputy, a man named Gary Hughes, who did not testify, as assistant chief engineer. (All agree that for all times material to the case Fofi and Hughes were statutory supervisors. Tr. 597.)

Both Fofi and Hughes had position descriptions. The former read as follows:

Lee Fofi

MONTE CARLO

LAS VEGAS

JOB DESCRIPTION

JOB TITLE: CHIEF ENGINEER POSITION CODE: ENG023
MINIMUM AGE REQUIREMENT: 21 YEARS OF AGE
DEPARTMENT: ENGINEERING
REPORTS TO: GENERAL MANAGER
SUPERVISES: ENGINEERING STAFF

GENERAL SUMMARY OF DUTIES: The Chief Engineer is in charge of the overall operation of the Engineering Department on a twenty-four (24) hour basis. He is responsible for planning, directing and controlling the department.

TYPICAL PHYSICAL/MENTAL DEMANDS: Communicate directly, telephonically, electronically and by transcription with guests, general public, management and staff in English. Work accurately with intermediate math skills; able to utilize a calculator; requires normal vision range and absence of color blindness; requires the ability to distinguish letters and symbols. Understand and comply with Policies and Procedures, Job Description, daily memorandums, chemical labels and other instructions.

TYPICAL WORKING CONDITIONS: Be mobile in all areas of hotel and surrounding property; extensive contact with departments and staff. Able to tolerate varying conditions of noise level, temperature, illumination and air quality.

EXAMPLE OF DUTIES (includes but is not limited to the following):

1. Plan, organize and schedule all Engineering activities.
2. Determine personnel requirements for Engineering Department.
3. Prepare Monthly, Quarterly and Annual Forecast for Engineering Department.
4. Establish and maintain sufficient materials and parts to keep the Hotel/Casino in peak operating condition.
5. Establish and maintain files for the department.
6. Establish and maintain an inventory of carpet used throughout the Hotel/Casino. Determine and schedule major replacements.
7. Establish and maintain a safe working environment for employees.
8. Research, schedule and oversee all structural, mechanical and electrical additions or changes throughout Hotel/Casino.

PERFORMANCE REQUIREMENTS:

Knowledge, Skills & Abilities: Pleasant personality, team oriented and enjoys working with and serving people. Skill in establishing and maintaining effective working relationships with staff. Working knowledge of plumbing, electrical and mechanical equipment. Ability to perform intermediate math.

Education: Minimum high school education or equivalent; college preferred with background in business administration/management.

Experience:

1. Three (3) to five (5) years experience management experience of a large property.
2. Three (3) to five (5) years experience in a supervisory capacity.
3.Three (3) to five (5) years as an engineer.

Certicate/License: Non-Gaming LVMPD Sheriff's Card.

ALTERNATIVE TO MINIMUM QUALIFICATIONS: NONE

[G.C. Exh. 20.]

The latter reads as follows:

Gary Hughes

JOB DESCRIPTION

JOB TITLE: Assistant Chief Engineer
DEPARTMENT: Engineering
REPORTS TO: Chief Engineer
EFFECTIVE DATE: June 21, 1996

JOB SUMMARY:

It is the responsibility of the Assistant Chief Engineer to assist in managing and directing the Engineering Department/-Maintenance operation on a 24-hour basis and to assure all functions are performed in accordance with departmental and Monte Carlo Resort and Casino policies and practices. Responsible for ensuring the completion of the daily assignment log. Supervises subordinate personnel in the maintenance, repair and modification of facilities and equipment within property. Duties are performed within the framework and intent of the Monte Carlo.

ESSENTIAL FUNCTIONS:

1. Responsible of assisting the Chief Engineer in directing and managing the Engineering Department on a 24-hour basis, ensuring all activities and job duties performed according to department and Monte Carlo policies and procedures.
2. Reviews, plans and coordinates all job assignments, setting priorities, making cost-effective assignment decisions and ensures the quality of work and completion of projects in a timely manner.
3. Prepares complete annual preventative maintenance schedules to ensure and effective efficient approach to all sytems and equipment maintenance.
4. Conducts employees briefings prior to the start of and end of a shift for the purpose of making job assign-

ments and discusses any problems or concerns. Conducts periodic meetings to review and discuss policies and procedures, address problems and concerns, and sense of teamwork and ownership of department responsibilities.

5. Responsible for the employees department orientation on departmental policies procedures and funcational job duties. Ensures employees become thoroughly familar with the facility, receive comprehensive training and have complete understanding of the job and its standards.

6. Responsible for ongoing training of existing employees as necessary to ensure department standards are met. Cross training as necessary for efficiency and effectiveness of department and expands employees' expertise to other functional areas within department.

7. Ensures adequate staffing for engineering duties and project completion thru accurate manpower planning and projection of required equipment and supplies.

8. Assists the Chief Engineer in determining the feasibility and expense of various projects through the preparation of data on material cost and man hour requirements. Make recommendations for cost savings measures.

ADDITIONAL RESPONSIBILITIES:

1. Assists the Chief Engineer in the preparation and maintenance of the annual budget.

2. Interviews, screens and hires the most qualified individuals to work in engineering. Initiates recommendations for change in classification, salary action, promotions, transfers, terminations.

3. Keep the Chief Engineer and lead watch informed on all pertinent information and reports all significant irregularities or problems as they occur.

4. Performs a variety of other managerial/supervisory duties as required.

REQUIREMENTS:

Physical
Must possess the ability to:

1. Access all areas of the facility and travel off property when representing the company.

2. Access hard-to-reach and potentially dangerous areas and work in areas from crawl space and the roof of the facility. Job assignments may require working with hazardous equipment chemicals.

3. Effectively listen and verbally communicate telephonically and in person with management, employees and outside contacts. Ability to read and evaluate reports, correspondence statistical reports.

4. Ability to make decisions and work independently and the physical and mental stamina work under pressure when dealing with multiple work assignments and meeting deadlines.

Non-physical
Must possess:

1. Extensive knowledge of the Monte Carlo facilities and equipment, specific management experience in engineering and the successful application these concepts in a hotel/casino environment.

2. The perception and awareness of the company's facilities/maintenance policy and goals to assist in formulating and implementing of an effective maintenance strategy for the hotel.

3. Excellent oral and strong written communication skills to effectively manage the department.

EDUCATION/EXPERIENCE:
Must possess:

1. Education level usually associated with the attainment of a Degree in Business and certification from a trade school or equivalent work experience.

2. Experience in working in a management or supervisory level position with strong knowledge of engineering principles and theories, specifically in hotel/casino operations.

Certificate/License

1. Employment eligibility for the United States.

2. Valid non-gaming Sheriff's card.

[G.C. Exh. 21.]

To reduce the risk of hiring incompetent employees, Fofi concentrated his search for employees on those people he had worked with at the MGM Grand. From this source, Fofi recruited Paul Leysen, an alleged discriminatee, Rene Alvarez, a rebuttal witness for the General Counsel and current Respondent employee and Curt Beasley, also a rebuttal witness for General Counsel and former Respondent employee. For several weeks prior to the actual date of hire of these MGM Grand employees, Fofi hosted weekly breakfast meetings at a local restaurant in order to keep prospective employees updated on important information, such as the progress of construction and the dates the jobs would become available. Fofi did not limit his recruiting to the MGM Grand. Years before he worked there, he worked at another Las Vegas property called the Alexis Park. The chief engineer there was Frank Pangallo who, while working at a different job in November, 1995, happened to meet Fofi, strictly by chance. Pangello was dissatified with his current position and Fofi was looking for Respondent engineers who did good work. Fofi remebered Pangallo and after both men recalled some old times, Pangello was eventually hired for the graveyard shift. Both Leysen and Pangallo began work on March 18. About four other engineers including Alvarez, started on the same day in the first engineering department hiring after Hughes. To establish seniority among the six engineers, Fofi instructed his secretary to draw names out of a hat. (To minimze later disputes, the entire procedure was videotaped.)

Approximately 45–46 engineers were eventually hired by Fofi by the time Respondent opened to the public. Counting auxiliary staff such as secretaries, dispatchers, and others, about 76 employees were employed in the engineering department under Fofi and Hughes. This figure includes people employed on the day, swing and graveyard shifts. Respondent offered three organizational charts into evidence for these shifts: For the day shift, the "Lead Central Plant" job, a title General Counsel urges was held by Leysen, is listed on a line equivalent in authority to "Painter," "Carpenter," "Lead Electrician," and other classifications (R. Exh. 20). For the swing shift, "Swing Supervisor" is listed above "Locksmith," "Engineers" and other classifications (R. Exh. 21). For the graveyard shift, the "Grave Supervisor," a title Respondent urges was held by Pangallo, is listed above "Plumber," "Maintenance Engineer" and other classifications (R. Exh. 22).

3. Duties and responsibilites of alleged discriminatees

a. Paul Leysen

Leysen was hired on March 18 and terminated on October 10. In reviewing the facts and circumstances surrounding Leysen's status, I begin by finding in general, Leysen was not a highly credible witness. Time after time, he was impeached by Respondent's counsel. Here are a few examples: Leysen could not recall ever telling anybody he was the central plant manager (Tr. p. 49). However, in an application for employment after his termination from Respondent, Leysen described his job at Respondent as "Plant Manager" (R. Exh. 1). In another application for employment, Leysen described his job at Respondent as "Engineer CP Manager" (R. Exh. 25, p. 2). In the former application, Leysen wrote as a reason for leaving Respondent, "Job benefits promised, not delivered after start-up." In addition, Leysen denied ever commending Respondent engineering employees for work performed (Tr. 100). However, in an entry in the central plant logbook.[6] Leysen did just that (R. Exh. 14). Contrary to his testimony at hearing that he did not supervise other employees, Leysen caused to be prepared a resume and submitted it with an application for employment to a prospective employer stating that at Respondent, Leysen directed five coworkers during the day shift (R. Exh. 25). Also, Leysen gave certain testimony at hearing at variance with statements contained in his affidavit to the Board (Tr. 514–521).

Respondent contends in its brief (Br. 52), that the impeachment contained in Leysen's employment application are also admissions (FRE 801(d)(2)(A)) and should be considered as substantive evidence.[7] Neither Leysen nor Pangello are Charging Parties, so it is not at all certain, they are properly "party-opponents" for purposes of applying FRE 801(d)(2)(A) to the statements at issue. This question need not be decided, however. I will assume arguendo that the statements of Leysen (and similar statements by Pangallo) are admissions against interest. I assign little weight to the alleged admissions, however, because regretably, in today's culture, the concept of "resume inflation" appears to have taken hold. Without condoning the practice, I find that Leysen's decision to "beef up" his resume is not very probative of the pending issues and that this case will rise or fall on other evidence to show whether or not he is a supervisor. On the other hand, I find that Leysen's testimony must be carefully scrutinzed in light of the impeachment.

At the end of the hearing, Respondent produced a job description for "Central Plant Lead," which reads as follows:

Paul Leysen
JOB DESCRIPTION

JOB TITLE: Central Plant Lead
DEPARTMENT: Facilities
REPORTS TO: Director of Facilities

JOB SUMMARY:

Supervises and schedules personnel, and oversees and inspects the quality of work assignments ensuring that all work is completed. Responsible for the maintenance and operation of the chillers, hot water boilers, pumps, air compressors, cooling towers, generators, and other related equipment in the Central Plant. Serves as a working supervisor.

ESSENTIAL FUNCTIONS:

1. Supervises and schedules personnel with the Facilities Manager's approval.
2. Oversees and inspects the quality of all completed assignments.
3. Ensures that all assigned and dispatched work is completed efficiently and accurately.
4. Responsible for the maintenance and operations of the chillers, hot water boilers, pumps, & compressors, cooling towers, generators, and other related equipment in the Central Plant.
5. Reports on a daily log all operational conditions within the Central Plant.
6. Serves as a working supervisor.

ADDITIONAL RESPONSIBILITIES:

1. Advices the Director of Facilities of any unusual conditions within the Central Plant.
2. Requisitions all materials needed to maintain the Central Plant.
3. Performs other related duties as requested.

REQUIREMENTS:
Physical
Must possess the ability to:

1. Access all areas of the facility, including hard-to-reach and potentially dangerous areas and work in areas from crawl spaces to the roof of the facility. Job assignments may require working with hazardous equipment and chemicals.
2. Work from a standing position and/or walking motion for extended periods of time.
3. Climb ladders onto raised areas.
4. Work from a crouching and/or stooping position for extended periods of time.
5. Tolerate working both extreme heat and extreme cold for extended periods of time.
6. Wear a tool belt.
7. No restrictions on lifting or bending.

Non-Physical
Must possess:

1. Extensive knowledge of repair and preventative maintenance of the central plant equipment.
2. The perception and awareness of the Company's facilities/maintenance polices and goals.
3. Adequate verbal and written communication skills to understand and converse with supervisor and coworkers regarding job duties.

Education/Experience
Must possess:

1. High school education or equivalent.
2. Five years experience working in a Central Plant, preferably in a hotel or industrial complex.

Certificate/License

[6] The central plant logbook is a solid binder type book kept in the central plant office. The pages were numbered consecutively, any engineering employee could wrote in it and all or most at one time or another apparently did. The book was used primarily to record significant events on a shift, to communicate with employees of different shifts and for other miscellaneous purposes.

[7] An admission against interest may be used as evidence as well as to impeach. *Pratt & Whitney Aircraft*, 310 NLRB 1626 (1993).

1. Employment eligibility for the United States.
2. Valid non-gaming Sheriff card.

[R. Exh. 26.]

According to Fofi, he obtained a position description for central plant manager from the MGM Grand, and adopted it for his needs at Respondent. Leysen denied ever seeing the document and Fofi was not certain that he ever showed it to Leysen. I find that it was never shown to Leysen and is of little probative value in establishing the supervisory status of Leysen.[8]

I will revisit the subject of Leysen's duties in the Analysis and Conclusions section of this decision. But for now, I find that when hired, Leysen had about 30 years of experience as a maintenance engineer and that his job at Respondent on the day shift, was to work with the tools about 50 percent of his work time, both installing new equipment like compressors, and performing repairs and maintenance, instructing less experienced engineers on performing the same tasks, occasionally reviewing the work of others, consulting on complicated engineering problems, and other related jobs.

b. Vince Pangello

Pangallo was hired on March 18 as a graveyard lead watch and terminated on July 9. His position description, like Leysen's, was never shown to him. It reads as follows:

JOB TITLE: Watch Lead
DEPARTMENT: Facilities
REPORTS TO: Facilities Facilitator

JOB SUMMARY
Serves as shift supervisor during the absence of the Facilities Manager or the Facilities Facilitator, supervising employees in the Facilities Department, ensuring all work scheduled is assigned and completed.

ESSENTIAL FUNCTIONS

1. Serves as shift supervisor during the absence of the Facilities Manager or the Facilities Facilitator.
2. Oversees and inspects the completion of all work performed by subordinates.
3. Serves as a working maintenance technician and performs all of the duties of a maintenance technician.
4. Keeps the Central Plant and Facilities Management Center advised of any unusual conditions which might affect the operation of the equipment.
5. Reports on a daily log all operational conditions on his shift.

ADDITIONAL RESPONSIBILITIES:

1. Keeps the facilitators advised of all unusual conditions within the facilities.
2. Responds to all facility emergencies and coordinates containment and repairs.
3. Preforms other related duties as requested.

REQUIREMENTS:
Physical
Must possess the ability to:

1. Access all areas of the facility, including hard-to-reach and potentially dangerous areas and work in areas from crawl spaces to the roof of the facility. Job assignments may require working with hazardous equipment and/or chemicals.
2. Work from a standing position and/or walking motion for extended periods of time.
3. Climb ladders onto raised areas.
4. Work from crouching and/or stooping positions for extended periods of time.
5. Tolerate working in both extreme heat and extreme cold for extended periods of time.
6. Wear a tool belt.
7. No restrictions on lifting or bending.

NON-PHYSICAL
Must Possess:

1. Extensive knowledge of repair and preventative maintenance of facilities equipment.
2. The perception and awareness of the Company's facilities/maintenance policies and goals.
3. Adequate verbal and written communication skills to understand and converse with supervisor and co-workers regarding job duties.

EDUCATION/EXPERIENCE
Must possess:

1. High school education or equivalent.
2. Two years experience as a maintenance technician, preferably in a hotel or industrial complex property.

CERTIFICATE/LICENSE

1.Valid non-gaming Sheriff card
2. Employment eligibility for the United States.

[R. Exh. 27.]

Pangello too worked with the tools and spent over 50 percent of his time responding to work orders. Because his position description was never adopted by Pangallo, it is not probative of Pangello's supervisory status and I assign little weight to it.

With respect to Pangallo's status, Respondent called a witness named Bridgette Tate, who was hired on May 28, as an engineer on Respondent's graveyard shift. Fofi told Tate that Pangello was the senior watch on graveyard and Tate was to report to him. Contrary to Pangallo's testimony, I find that Pangello gave her a tour of the hotel when she was hired and trained her to reset steam boilers. Thereafter, Tate who specialized in lock repair was pretty much on her own. Her job assignments came mostly from the dispatcher, from work orders left over from prior shifts and occasionally from Pangallo. Tate testified that one of Pangello's most important duties was his responsibility for fire command center in the event of a fire. This involved locating any fire, calling for assistance, coodinating of fire fighting activities and insuring the safety of affected guests.

C. Analysis and Conclusions

1. Applicable legal principles

As the party seeking to prove that Leysen and Pangallo were supervisors at the time of their terminations, Respondent has the burden of proof. *Northwest Florida Legal Services*, 320 NLRB 92 fn. 1 (1995). Section 2(11) of the Act defines a "supervisor" as:

[8] Apparently the parties do not disagree since the position descriptions were not produced for the record until I requested them (Tr. 404). Furthermore, job descriptions do not necessarily vest employees with supervisory powers. *NLRB v. Security Guard Services, Inc.*, 384 F.2d 143, 149 (5th Cir. 1967).

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

The first portion of Section 2(11) is read in the disjunctive. The possession of any of the powers enumerated there, however, confers supervisory status only if its exercise "involve[s] the use of true independent judgment in the employer's interest" *Beverly Enterprises v. NLRB*, 661 F.2d 1095, 1098 (6th Cir. 1981).

In *Cassis Management Corp.*, 323 NLRB 456 (1997), the Board explained, that in enacting Section 2(11),

> Congress stressed that only persons with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen, . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Additionally, the Board has often held that building superintendents were nonsupervisory employees.[6]

[6] *Hagar Management Corp.*, 313 NLRB 438 (1993); *J.R.R. Realty Co.*, 273 NLRB 1523 (1985), enfd. 785 F.2d 46 (2d Cir. 1986); and *Elias Mallouk Realty Corp.*, 265 NLRB 1225 (1982) . . . .

In *Chevron Shipping Co.*, 317 NLRB 379, 380–381 (1995), the Board stated that it has a duty, "not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intented to protect."

As pointed out by the administrative law judge in *Chicago Metallic Corp.*, 273 NLRB 1677, 1688–1689 (1985), affd. relevant part 794 F.2d 527 (9th Cir. 1986):

> The status of a supervisor under the Act is determined by an individual's duties, not by his title or job classification. It is well settled that an employee cannot be transformed into a supervisor merely by the vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act. To qualify as a supervisor, it is not necessary that an individual possess all of these powers. Rather, possession of any one or them is sufficient to confer supervisory status. However, consistent with the statutory language and legistative intent, it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated functions. . . . Thus, the exercise of some supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not elevate an employee into the supervisory ranks, "the test must be the significance of his judgment and directions." Consequently, an employee does not become a supervisor merely because he gives some instructions or minor orders to other employees. Nor does an employee become a supervisor because he has greater skills and job responsibilities or more duties than fellow employees. Additionally, the existence of independent judgment alone will not suffice for, "the decisive question is whether [the employee has] been found to possess authority to use independent judgment with respect to the exercise . . . of some one or more of the specific authorities listed in Section 2(11) of the Act." In short, "some kinship to management, some empathetic relationship between employer and employee must exist before the latter becomes a supervisor for the former." Moreover, in connection with the authority to recommend actions, Section 2(11) of the Act requires that the recommendations must be effective. [Citations omitted.]

See also *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 247–248 (6th Cir. 1983), where the court concluded that the disputed employees were leaders, but not supervisors, because none of the functions they performed required them to exercise independent judgment. The court also noted, as is true in the instant case, the disputed employees did not participate in formulating or developing company policy.

2. Whether Leysen and Pangello have been proven to be statutory supervisors

I begin by comparing Fofi and Hughes, admitted supervisors, to Leysen and Pangallo with respect to various factors.[9]

	Fofi/Hughes	Leysen/Pangello (and all other nonsupervisory engineering employees
Wages	Salary	Hourly
Overtime	None	Time and one-half
Life Insurance	$15,000	$7,500
Health Insurance	Same	Same
Parking	Special place (Fofi only)	Not applicable
Seniority	Not Applicable	Names drawn out of hat (first group hired on March 18)
Work Uniform	Not Applicable	Green pants/gray shirt
Time Clock	Not Applicable	Must punch in and out
Tool Belt	Not Applicable	Carries on job
Works with Tools	Not Applicable	Certain percent of work day, works with tools
Office	Special place	Central plant office Used by all engineers
Management Meetings[10]	Attended	Attended (Leysen and Pangallo only)

[9] Many of these factors are secondary indicia of supervisory status and are not dispostive in the absence of evidence indicating the existence of any one of the primary indicia of such status. *Chrome Deposit Corp.*, 323 NLRB 961–963 fn. 9 (1997); *St. Francis Medical Center West*, 323 NLRB 1046 (1997).

[10] The routine meetings were held on a daily basis before the day shift started and usually discussed any work problems which had occurred on the prior shift and the work which needed to be done on the coming shift.

It is undisputed that Leysen was hired as an "engineer" on March 18 at the rate of $20.62 (G.C. Ex. 6). On April 12, Leysen was still considered an "engineer," but he received a pay raise to $21 per hour (G.C. Exh. 7). According to Fofi, once Respondent opened for business, Leysen became a central plant manager and was introduced not only to other employees, but to outside contractors as "manager." In fact, on August 26, Leysen signed an industrial accident report as supervisor (R. Exh. 16). The inferences which may flow from this are rebuttal by current employee[11] Rene Alvarez who started with Leysen in the engineering department on March 18, and testified that Leysen never said he was a supervisor, that no one else ever described him as a supervisor, and that Alvarez didn't consider him a supervisor (Alvarez had an engineering specialty in water treatment and cooling towers and considered it part of his job to know what work needed to be done.). Alvarez was supported by the testimony of two other General Counsel rebuttal witnesses, Curt Beasley and David Smith, both former Respondent employees in the engineering department. Although the three employees did not consider Leysen to be their supervisor—Alvarez was told by Fofi that, Leysen was his boss—the fact is that none of this means very much. The subjective perceptions of others are not dispostive of supervisory status. *Blue Star Ready-Mix Concrete*, 305 NLRB 429, 430 (1991). Moreover, as already noted, the terms "supervisor," "central plant manager," or even "boss" are not conclusive since title is in and of itself is insufficient to confer supervisory status. *Davis Supermarkets*, 306 NLRB 426, 458 (1992), enfd. 2 F.3d 1162 (D.C. Cir. 1993).

At 30 of its brief, Respondent tenders several arguments in support of Leysen's supervisory status. First, Leysen allegedly effectively recommended two persons, Alvarez and Paul Glass, for hire. Glass did not testify, but it appears that both worked for MGM Grand Hotel and were known to Fofi who hired them for Respondent. There is no evidence that Leysen played any role in the hiring of Alvarez. Fofi was familar with Alvarez's good work at the MGM Grand, and knew he had received special training in water treatment, a speciality needed by Respondent. Fofi exercised his own judgment to hire Alvarez. As for Glass, Leysen merely told Fofi that Glass might be ameanable to leaving MGM Grand to work for Respondent. This occurred in June after Respondent opened, in response to Fofi's question directed to several engineers at the time whether anyone knew of good engineers. Leysen told Fofi that Glass was interested in discussing an engineering position on the day shift. I find the evidence here inadequate to support any conclusion that Leysen recommended Glass for hire. Compare *Queen Mary*, 317 NLRB 1303 (1995).

Respondent also argues that Leysen had the authority effectively to recommend that an employee named Suvoski be transferred as a disciplinary matter. This contention requires some background for proper consideration. A current Respondent employee named Edward Suvoski was called as a Respondent witness. Now a day-shift lead engineer, Suvoski started at Respondent in May and at first worked with Leysen in the central plant. According to Suvoski, Fofi told Suvoski to report to Leysen, the supervisor in charge of the central plant. In July or August, Suvoski was transferred from the central plant to the hotel/casino by Fofi. Fofi told Suvoski that he was being transferred at the request of Leysen who had told Fofi that Suvoski was disruptive. The change in assignment did not result in more onerous work, a different shift, or a reduction in pay. In fact, about 1–2 months after his transfer, Suvoski's pay was raised from $20.62 to $21.62 and he was made a lead engineer (In his new job, Suvoski's supervisor was Gary Hughes, an undisputed statutory supervisor.). Suvoski considered the transfer routine (Tr. 254). Fofi did not consider the transfer disciplinary; rather Fofi called it "a transfer to accommodate harmony in a work place" (Tr. p. 404). Sometime before Suvoski was transferred, Beasley gave Fofi notice that he was leaving. When Fofi asked why, Beasley said one reason was that he had heard Suvoski was "talking bad about me." Fofi asked Beasley if he would stay, if Fofi transferred Suvoski out of the central plant, or Beasley could work on a different shift. Beasley rejected both offers and left Respondent.

A second employee named Pelemo, who did not testify, was also transferred by Fofi from central plant to the hotel tower to assist with room calls. Pelemo stayed on the same graveyard shift and his salary also remained the same. Fofi testified that he made the transfer after receiving information from both Leysen and Pangello that Pelemo could not master the computer. Pelemo's inability to learn the computer's operation resulted in more work for other employees in the engineering department.

I consider this evidence insufficient to establish or even support supervisory status. Niether Leysen nor Pangallo was engaged in disciplinary duties, but were merely pointing out to Fofi, flaws in the work of Suvoski and Pelemo. See *Food Mart Eureka*, 323 NLRB 1288 (1997); *Appollo Construction Co.*, 322 NLRB 996 (1997).[12]

To bolster this part of its argument, Respondent also directs my attention to Suvoski's testimony regarding an incident where he allegedly was caught between conflicting demands of Fofi and Hughes on the one hand and Leysen on the other. One day before his transfer, Suvoski was given an assignment by Fofi and Hughes which required him to leave the central plan area without notifying Leysen, contrary to policy. When Leysen found out that Suvoski had left the area, he allegedly scolded Suvoski supposedly saying, "the next time Fofi and Hughes tell you to do something, tell them to go F— themselves." Fofi testified that Suvoski reported this insubordination to him, but Fofi's reaction was to talk to Leysen about the incident, without taking any action (Tr. 418). Leysen denied ever making the remark in question to Suvoski.

I credit Suvoski's and Fofi's account,[13] but find it of no benefit in establishing Leysen's supervisory authority. Clearly Suvoski knew that he must obey the orders of Fofi and Hughes without telling them to go f— themselves. This incident reflects Fofi's tolerance for shop talk and reactions of employees under pressure shortly before the hotel opened. At best, this evidence shows an isolated and infrequent incident of supervi-

[11] As a current employee, Alvarez is entitled to enhanced credibility. *Penbrook Management, Inc.*, 296 NLRB 1226, 1237 fn. 5 (1989).

[12] Again, I find insufficient evidence to prove that Leysen "effectively recommends," i.e., that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children's Farm Home*, 324 NLRB 61 (1997).

[13] My attention is directed to R. Exh. 8 (p. 30) written by Leysen, which reads in the central plant log for May 28, 1996,

Attn: Ed

. . . .

Stay on Assigned Duties

as evidence corroborating the testimony of Suvoski and Fofi.

sion which does not elevate a rank and file employee to supervisor. *Children's Farm Home*, supra; *St. Francis Medical Center-West*, supra, 323 NLRB 1046.

It is true that Leysen gave other employees instructions from time to time, but this does not render the instructing employee a supervisor for purposes of the Act. *Stop & Shop Co. v. NLRB*, 548 F.2d 17, 19 (1st Cir. 1977). Rather, Leysen's authority reflects no more than a more skilled employee advising one less skilled. See *NLRB v. Magnesium Casting*, 427 F.2d 114, 118 (1st Cir. 1970), affd. 401 U.S. 137 (1971); *Adco Electric*, 307 NLRB 1113, 1120 (1992), affd. 6 F.3d 1110, 1117 (5th Cir. 1993). Many of the engineers had special skills such as Alvarez in water treatment, or Tate as a locksmith. Where this is so and management prepares a master schedule based on these skills as was done by Fofi in the instant case, assignment of daily jobs amounts merely to routine implementation of orders. *Quadrex Environmental Co.,* 308 NLRB 101 (1992). See also *Highland Superstores v. NLRB*, 927 F.2d 918, 921 (6th Cir. 1991). In this case job assignment is also affected by the dispatcher or even the employees deciding for themselves what jobs to perform. In sum I find insufficient use of independent judgment to assign work to establish supervisory status. Compare *Rose Metal Products*, 289 NLRB 1153 (1988). In addition, Leysen spent little time in checking the work of the other engineering employees. See *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988). Compare *Iron Mountain Forge Corp.*, 278 NLRB 255 (1986).

Contrary to Respondent's claim, I find that to the extent Leysen gave orders to other employees, which can not be attributed to his greater skill as a leadman, he was merely a conduit for relaying information from Fofi and Hughes. See *Chrome Deposit Corp.*, supra, 323 NLRB 961. In part, this was the purpose of the daily meetings which have been referred to above.

In conclusion, I find that Leysen does not "responsibly direct" the work of other employees. That is, there is no evidence he is answerable for the discharge of a duty or obligation. See *NLRB v. KDFW, Inc.*, 790 F.2d 1273, 1278 (5th Cir. 1986). Leysen worked the day shift when both Fofi and Hughes were either present or reachable by phone. To the extent, Leysen allowed some employees to finish a task by working overtime, to leave early or come in late, Leysen remained "one of the gang who merely gives routine instructions, with no kinship to management." See *Providence Alaska Medical Center v. NLRB*, 156 LRRM 2001, 2005 (9th Cir. 1997). To the extent Leysen was permitted to call in outside contractors to perform repairs, his authority was circumscribed by policy. For example, Leysen had more discretion to call in a contractor during normal business hours, if the contractor was paid a monthly fee to come when called. Leysen had less discretion to call in any contractor during nonbusiness hours because the hourly fees charged to Respondent were enormous. Consequently, Leysen had to judge the gravity of the emergency, e.g., an elevator in disrepair during a busy weekend. I find that Respondent has failed to prove that Leysen possessed any primary indicia of supervisory authority.

The evidence to support Pangello's supervisory status is more sparse than for Leysen. As already noted, Pangallo was hired on March 18 for $20.62/hour and received both a shift differential (to $20.97) and pay raise for a final pay of $21.72/hour at time of termination on July 9 (72 cents per hour for lead position). It is undisputed that Pangello like Leysen, was first hired as an engineer. Then on June 17, Fofi instituted the graveyard shift and Pangallo was made graveyard shift lead (or fire watch). At 39–40 of its brief, Respondent makes an argument that Pangallo had "several" primary indicia of supervisor status. I find that he had none. As to Pangello's alleged authority to recommend the transfer of Pelemo, I have rejected that argument above. Similarly, I have rejected the argument that Pangallo directed the work of other employees and issued work assignments. In fact, on graveyard, employee independence and freedom from any kind of close supervision is a treasured feature for that otherwise undesirable shift. Essentially for the reasons stated for Leysen, which reasons apply even more here, I find no evidence to prove that Pangello was a statutory supervisor during his employment with Respondent. Instead, I find he was an employee who worked with his tools most of the time, responding to work orders, dispatches, or emergencies and having no kinship to management.

For the reasons stated above, I find that Respondent has failed to prove that Leysen and Pangallo were statutory supervisors during all times material to this case. Accordingly, as stipulated by Respondent both discriminatees were terminated, because they engaged in protected concerted activities in violation of Section 8(a)(1) and (3) of the Act. As further stipulated by the parties, on or about July 9, Respondent violated Section 8(a)(1) of the Act when Jacqueline DeRoode, Respondent's human relations director, who did not testify, interrogated employees Leysen and Pangello about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees (par. 6(a) of complaint). I further find that Respondent violated Section 8(a)(1) of the Act when DeRoode created the impression among Respondent's employees that their union activities were under surveillance by Respondent (par. 6(b) of complaint).

3. Whether the General Counsel proved certain additional violations of Section 8(a)(1) of the Act

Before the hearing began, the General Counsel amended the complaint to add new paragraph 5(h) which reads, "About July 10, 1996, the Respondent issued final warning disciplinary notices to Jerry Council and Gary Brickey for violation of [Respondent's] Employee Handbook Rules 21 [no distribution] and 24 [no soliciting, procuring or engaging in any immoral acts on the premises]" (G.C. Exh. 3.) Neither Council nor Brickey testified. As mentioned above, Respondent elected to present no further evidence with respect to the amendment.

When the issue of the General Counsel's amendment to the complaint was first raised at hearing, Respondent objected in part on the grounds there was no underlying charge to support the allegations (Tr. 19–21). This contention was renewed in the Amended Answer and supplemented with a number of other "Affirmative Defenses." Other than the argument that the two alleged discriminatees are statutory supervisors, the other affirmative defenses have not been briefed. Under these circumstances, the questions presented are waived. Cf. *Local 137 v. Food Employers Council*, 126 LRRM 2223, 2225 fn. 2 (9th Cir. 1987); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1025–1026 (7th Cir. 1988); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1988).

With respect to Respondent's terse comment at hearing, about the amendment lacking an underlying charge, I find that under the authority of *Nickels Bakery*, 296 NLRB 927 (1989) the amended allegations of the complaint are sufficiently re-

lated to the underlying charge and, therefore, Respondent's objection lacks merit.

The evidence shows that Council and Brickey were hired by Respondent as engineers on or about June 17 and 24, respectively (G.C. Exhs., 9, 10, and 11). Subsequent to their hire, both received disciplinary notices from DeRoode for violations of rules 21 and 24 of the employee handbook (G.C. Exhs. 12, 13). The handbook is in the record (G.C. Exh. 16), and at page 21 the rules reads as follows:

> #21 Unauthorized posting, distribution, sale or circulation of any written materials in working areas of unauthorized sale of anything while on the premises. (See section entitled "No Solicitation Policy.")
>
> #24 Soliciting, procuring or engaging in any immoral acts on the premises.

The disciplinary notices apparently were based on written witness statements from Respondent employees Thomas Cheasar and Steve Harris, neither of whom testified, as taken by DeRoode and Fofi on July 9. In the first statement (G.C. Exh. 14), DeRoode asked Cheasar if any Respondent supervisor talked to him about joining a union or related issues. Cheasar told DeRoode that he overheard Pangallo in the engineering office on Respondent's premises tell Brickey that if he signed a card and joined the Union, Brickey wouldn't have to worry about being paid double-time for the holiday. Pangallo added that he felt everyone should sign a card.[14]

A second statement was provided by Respondent employee Steve Harris (G.C. Exh. 15). In that statement Harris told DeRoode that in the engineering office during work hours either Pangello or Council or both asked him to sign a union card. As a result of the interrogations of Cheasar and Harris, Council and Brickey received the disciplinary notices referred to above.

The General Counsel contends that Respondent violated Section 8(a)(1) of the Act both by the interrogations of Cheasar and Harris and the resulting disciplinary notices to Council and Brickey on July 10.

I agree with the General Counsel that asking an employee about his own union activities or the union activities of others is unlawful. *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub. nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). More specifically, asking about the signing of union cards by the employee or by other employees is unlawful. *Direct Transit, Inc.*, 309 NLRB 629, 632 (1992).

At pages 52–53 of its brief, Respondent contends that the interrogations of its employees Chesar and Harris were noncoercive; further that Respondent gave a valid *Johnnie's Poultry* warning (146 NLRB 770 (1964), enfd. denied 344 F.2d 617 (9th Cir. 1965)). Finding it unnecessary to consider any *Johnnie's Poultry* issue, I reject Respondent's argument and find that the two interrogations in issue were coercive. Both employees were told that Respondent was investigating supervisory conduct of Pangallo. I have found that Pangello was not a supervisor so Respondent had no right under the law to be asking about the union activities of employee Pangallo. Whether or not Respondent's officials DeRoode and Fofi believed that Pangello was a supervisor is no defense. *Answering, Inc.*, 215 NLRB 688, 689 (1974). But see *Cato Show Printing Co.*, 219 NLRB 739, 740 (1975).[15]

I also find it is unnecessary for me to cite and discuss such authorities as *Our Way, Inc.*, 268 NLRB 394 (1983), or *Hilton's Environmental, Inc.*, 320 NLRB 437 (1995), as urged by General Counsel (Br. 37). The simple fact is that Brickey and Council were disciplined (G.C. Exh. 12, 13) based on the unlawful and coercive interrogations of Cheasar and Harris. This discipline is therefore "fruit of the poisonous true"[16] and cannot stand as both notices violate Section 8(a)(1) and (3) of the Act as alleged.

CONCLUSIONS OF LAW

1. The Respondent, Victoria Partners, A Partnership of Mirage Resorts, Inc. and Circus Circus Enterprises, Inc. d/b/a Monte Carlo Resort & Casino, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Union of Operating Engineers, Local 501, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. For all times material to this case, Paul Leysen and Vicent Pangallo were not proven to be statutory supervisors pursuant to Section 2(11) of the Act.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Leysen and Pangello because of their protected concerted activities;

5. Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating employees about their union activities or the union activities of other employees; and violated Section 8(a)(1) and (3) of the Act by issuing disciplinary notices to employees based on information obtained from the unlawful interrogation of the other employees.

6. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer Paul Leysen and Vincent Pangallo full and immediate reinstatement to the positions they would have held but for their unlawful discharges. If their jobs no longer exist, Paul Leysen and Vincent Pangello are to be reinstated to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Further, Respondent shall be directed to make Paul Leysen and Vincent Pangallo whole for any and all loss of earnings and other rights, benefits, and privileges of employment they may have suffered by reason of Respondent's discrimination against them, with interest. Backpay shall be computed in the manner

[14] In an attached handwritten statement Cheasar wrote that the conversation referred to occurred during "work hours.' Cheasar also wrote that he overheard Council discussing the signing of union cards with other employees, in the shop, but before clocking in.

[15] In *Harvey's Resort Hotel*, 271 NLRB 306, 307 fn. 12 (1984), the Board declined to consider whether the precedents on the issue in question were conflicting.

[16] Cf. *Brown v. Illinois*, 422 U.S. 590, 597–600 (1975). In a criminal law context, court cited Id. at 598–599, *Nardone v. U.S.*, 308 U.S. 338, 341 for the issue "granting establishment of the primary illegality, [whether] the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." I find in the instant case, no purge of the primary taint.

set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Florida Steel Corp.*, 231 NLRB 651 (1971), and *Isis Plumbing Co.*, 139 NLRB 716 (1962).

Respondent shall also be required to expunge any and all references to the unlawful discharges of Leysen and Pangello and to also expunge the unlawful disciplinary notices dated July 1996 issued to Gary Brickey and Jerry Council from their files and notify all of them in writing that this has been done and that the unlawful discharges and disciplinary notices will not be the basis for any adverse action against any of them in the future. *Sterling Sugars*, 261 NLRB 472 (1982).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Victoria Partners, A Partnership of Mirage Resorts, Inc. and Circus Circus Enterprises, Inc. d/b/a Monte Carlo Resort & Casino, Las Vegas, Nevada, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees in order to discourage union activities.

(b) Unlawfully and coercively interrogating employees about their own union activities or the union activities of other employees.

(c) Issuing written warnings to employees based on information obtained from coercive and unlawful interrogations of other employees.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer immediate and full restatement to Paul Leysen and Vincent Pangallo to the positions they would have held, but for their unlawful discharges. If their jobs no longer exist, Leysen and Pangello are to be reinstated to substantially equivalent positions without prejudice to their seniority or other rights and privileges.

(b) Make whole Leysen and Pangallo for any and all losses incurred as a result of Respondent's unlawful discharges of them, with interest, as provided in the remedy section of the decision.

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the discharges of Leysen and Pangello and notify them in writing that this has been done and that Respondent's discharge of them will not be used against them in any future personnel actions.

(d) Also, within 14 days from the date of this Order, expunge from its files any and all references to the disciplinary warnings issued in July 1996 to Gary Brickey and to Jerry Council and notify them in writing that this has been done and that these disciplinary notices will not be used against them in any future personnel action.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of bakpay due.

(f) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1996.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."